

DECISION

25203
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE: B-210139**DATE:** May 20, 1983**MATTER OF:** Empire Moving and Storage Co.**DIGEST:**

Where Small Business Administration (SBA) regional office determines low bidder under small business set-aside procurement to be other than small, agency may not award contract to that firm on the basis that improper size standard was used. Because the size standard included in the solicitation was not timely protested, it was binding with respect to that particular solicitation and the contracting officer, by making award under a size standard different from that listed in the solicitation, improperly changed one of the "ground rules" of the procurement.

Empire Moving and Storage Company protests the award of a contract for packing, crating, and movement of personal property to Towne Services of El Paso, Inc., under invitation for bids (IFB) No. DABT51-82-B-0107 issued by Fort Bliss, Texas. Empire contends that Towne is a large business and therefore is ineligible for award on this small business set-aside procurement.

For the reasons that follow, we sustain the protest.

Paragraph L-7 of the IFB provided that a bidding concern would be classified as small "if the average annual receipts of the concern and its affiliates for the preceding 3 fiscal years do not exceed \$2 million." Both the agency and the protester agree that a \$7 million standard should have been applicable to this procurement.

The agency opened four bids on the October 8, 1982 bid opening date. Towne was the low bidder on one of the solicitation's three schedules of services. Empire, in

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accordance with Defense Acquisition Regulation (DAR) § 1-703(b), filed a protest with the contracting officer challenging Towne's status as a small business. The contracting officer forwarded the protest to the Small Business Administration's (SBA) regional office, noting in his letter that "the size standard of \$2 million * * * is incorrect and should reflect \$7 million * * *." By letter dated November 15, the SBA regional office decided that although the agency mistakenly included the \$2 million size standard in the solicitation, since the solicitation had not been amended or the size standard appealed to the SBA, "the \$2 million size standard is binding for the present size determination." Further, the regional office concluded that "it is the determination of this Office that Kent Movers, Inc. d/b/a Towne Services of El Paso (and its affiliates) is other than small for the purposes of Government procurement having a size standard of average annual receipts for the preceding 3 fiscal years not to exceed \$2 million." As a "point of information," the regional office stated that under the \$7 million standard Towne would be considered a small business. No party appealed this determination to the SBA Size Appeals Board. On December 2, notwithstanding the SBA's determination, the Army awarded a contract to Towne.

The contracting officer reports that he considered canceling the solicitation when the use of the erroneous size standard was discovered, but decided against it because there was an urgent need to make award, bids had been revealed, and adequate competition had been obtained. In addition, the contracting officer reports, he performed an informal survey of the six firms on the bidder's list that did not respond to the solicitation and "determined that the size standard was not a factor in the lack of responses," thereby leading him to conclude that "continuation of the solicitation would not have a harmful effect on competition." He further concluded that award to Towne rather than to Empire, the next low bidder, was appropriate in light of (1) the SBA's determination that the \$7 million size standard was the correct standard for the services being acquired, (2) the fact that Towne would be considered a small business under that standard, and (3) the fact that Empire, as the second low bidder rather than the low bidder, would not be entitled to award under the correct standard.

We can appreciate the contracting officer's attempt to balance the equities and make the best of the situation which resulted from the use of the incorrect size standard. We do not believe, however, that he was free to make the decision he did. The size standard included in a solicitation is controlling for any award made under that solicitation unless the standard is timely protested and the SBA Size Appeals Board rules that the incorrect standard was used.) DAR § 1-703(c); 13 C.F.R. §§ 121.3-8 and 121.3-6 (1982). This is so even if an erroneous size standard is used. International Limousine Service, Inc., B-207136, August 26, 1982, 82-2 CPD 180 (where an erroneous \$2 million size standard was held to govern size status determinations for the procurement).

No party appealed the inclusion in this solicitation of the \$2 million standard. Therefore, under the regulations that standard was final with respect to the solicitation and the contracting officer could not ignore it. Rather, he could either have canceled the solicitation, which he elected not to do, or could have awarded a contract to the low responsive, responsible bidder which qualified as a small business under that \$2 million size standard. By awarding to Towne as he did, the contracting officer in effect changed one of the "ground rules" (the size standard) of the procurement for the benefit of one bidder--and that is, of course, inherently improper. See Union Carbide Corporation, 55 Comp. Gen 802 (1976), 76-1 CPD 134. That the non-participating firms chose not to bid for reasons not related to the size standard used does not change the fact that the bidders that did participate in the procurement were entitled to rely on the size standard included in the solicitation.

Under the circumstances, we must sustain the protest.

The Army argues that even if we find that the contracting officer acted improperly in awarding the contract to Towne, the contracting officer acted reasonably and therefore a termination for convenience would be inappropriate. We disagree. The regulations are explicit regarding the effect of a contracting officer's determination as to which size standard applies when that determination is not appealed, as well as the effect of

an SBA determination that a bidder is other than small under that size standard. Thus, we believe that the contracting officer did act unreasonably in awarding a contract to Towne in the face of the SBA's adverse size determination. We recommend that the Army terminate the contract with Towne for the convenience of the Government and either award the remainder of the requirement to the next low responsive, responsible bidder or resolicit the requirement.

This decision contains a recommendation for corrective action to be taken. Therefore, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720, as adopted by P.L. 97-258, which requires the submission of written statements by the agency to the Committees concerning the action taken regarding our recommendation.

for *Harry D. Van Cleave*
Comptroller General
of the United States